

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, NASHVILLE RESIDENT OFFICE**

JOHNSTON FIRE SERVICES, LLC	:	
and	:	10-CA-175681
	:	10-CA-177542
ROAD SPRINKLER FITTERS	:	10-RC-177308
LOCAL UNION 669	:	

**CHARGING PARTY’S EXCEPTIONS TO THE DECISION OF
ADMINISTRATIVE LAW JUDGE KELTNER W. LOCKE**

Respectfully submitted,

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Pursuant to the National Labor Relations Board's Rules and Regulations, Charging Party hereby submits the following Exceptions to the Decision and Recommended Order of Administrative Law Judge Keltner W. Locke in the above-captioned case. As more fully set out in its Brief in Support of Exceptions, Charging Party requests that the Board reject or modify the following Findings of Fact, Conclusions of Law, and Remedies in the Decision.¹

1. The ALJ's finding that "the credited testimony does not establish that Respondent unlawfully discharged two employees who cast challenged ballots in a Board-conducted representation election. Therefore, the challenges to their ballots should be sustained and the ballots not counted."² This finding is contrary to the record evidence and controlling law.
2. The ALJ's crediting of David Johnston's testimony over Michael Pirtle's regarding the conversation that took place between them during Pirtle's discharge on March 31, 2016.³ This finding is contrary to the record evidence.
3. The ALJ's finding that Pirtle's testimony regarding the March 31 conversation was "lean on detail" and his speculation that "ordinarily a discharge makes a lasting impression on the person being fired" to conclude that Pirtle's testimony was unreliable.⁴ This finding is contrary to the record evidence.
4. The ALJ's finding that "whenever Pirtle's account conflicts with Oliver's, I credit the latter. Accordingly, I find that on February 25, 2016, Pirtle did tell

¹ Respondent has simultaneously filed its Brief in Support of Exceptions to the ALJ's Decision. Citations to the ALJ's Decision will be cited as "ALJD" and followed by the page and/or line numbers. Citations to General Counsel Exhibits will be cited as GCX _____. Citations to Respondent's Exhibits will be cited as RX _____. Citations to the Transcript will be cited as Tr. followed by the page and/or line numbers.

² ALJD 1: Statement of the Case.

³ *Id.* at 8:15.

⁴ *Id.* at 8:16-21.

Oliver that he was ‘hazy’ and having memory problems.”⁵ This finding is contrary to the record evidence.

5. The ALJ’s finding that “Johnston’s testimony is more reliable than Pirtle’s.”⁶ This finding is contrary to the record evidence.
6. The ALJ’s finding that Pirtle was not a “reliable witness” and that he would “neither credit nor rely upon Pirtle’s testimony” but would “credit Johnston’s testimony instead.”⁷ This finding is contrary to the record evidence.
7. The ALJ’s conclusion that “the General Counsel has not proven the allegation in complaint paragraph 7(a), that the Respondent, by Johnston, created the impression that employees’ union activities were under surveillance.”⁸ This finding is contrary to the record evidence and controlling law.
8. The ALJ’s conclusion that the General Counsel also did not prove “the allegation raised on complaint paragraph 7(c), that [Pirtle] was untrustworthy because of his union activities.”⁹ This finding is contrary to the record evidence.
9. The ALJ’s speculation that Johnston may have asked Pirtle if he talked to Todd Johnson because he may have been “curious about the extent of Pirtle’s candor” without attributing any union animus to Johnston’s questioning of Pirtle.¹⁰ This finding is contrary to the record evidence and controlling law.

⁵ *Id.* at 9:33-35.

⁶ *Id.* at 9:37.

⁷ *Id.* at 10:14-16.

⁸ *Id.* at 10:28-30.

⁹ *Id.* at 10:31-32.

¹⁰ *Id.* at 10:41-42, FN 5.

10. The ALJ's finding that "the record does not establish that the Respondent had any history of harboring hostility to Union or protected, concerted activities," and weighed "against finding the question violated 8(a)(1)."¹¹ This finding is contrary to the record evidence and controlling law.
11. The ALJ's finding that Johnston was not seeking the information to decide "whether to take disciplinary action against Pirtle," and, therefore, "weighed against finding a violation."¹² This finding is contrary to the record evidence and controlling law. In addition, the ALJ failed to consider other reasons for the question that might have weighed in favor of finding a violation of 8(a)(1).
12. The ALJ's finding that the conversation between Pirtle and Johnston on March 31 took place in the parking lot and was a factor weighing against finding a violation.¹³ This finding is contrary to the record evidence and controlling law.
13. The ALJ's finding that Pirtle's asking about why he was being fired strongly implied the protected activity and, therefore, weighed against finding a violation.¹⁴ This finding is contrary to the record evidence and controlling law.
14. The ALJ's conclusion that "Johnston's question did not violate the Act" and was not unlawful interrogation.¹⁵ This finding is contrary to the record evidence and controlling law.

¹¹ *Id.* at 11:34-38.

¹² *Id.* at 11:40-42, 12:1.

¹³ *Id.* at 12:8-12.

¹⁴ *Id.* at 12:14-17.

¹⁵ *Id.* at 12:20-21.

15. The ALJ's recommendation that "the Board dismiss all allegations raised by complaint paragraphs 7(a), 7(b) and 7(c).¹⁶ This finding is contrary to the record evidence and controlling law.
16. The ALJ's conclusion, under *Wright Line*, that the General Counsel has not established the third essential element, the presence of antiunion animus."¹⁷ This finding is contrary to record evidence and controlling law.
17. The ALJ's finding that Johnston's question regarding whether Pirtle had spoken with union organizer Todd Johnson did not indicate "any hostility to the Union."¹⁸ This finding is contrary to record evidence and controlling law.
18. The ALJ's speculation that the timing between Pirtle's meeting with union organizer Johnson and Pirtle's discharge was "coincidence rather than causation" and that animus should not be inferred from this or any other circumstance.¹⁹ This finding is contrary to record evidence and controlling law.
19. The ALJ's conclusion that "the General Counsel has failed to establish the third essential *Wright Line* element" and "has not proven that Pirtle's discharge violated the Act."²⁰ This conclusion is contrary to record evidence and controlling law.
20. The ALJ's comparison between employees Pirtle and Gordon and finding probative value in the fact that employee Gordon was not disciplined or

¹⁶ *Id.* at 12:23-24.

¹⁷ *Id.* at 13:40-41.

¹⁸ *Id.* at 14:7-8.

¹⁹ *Id.* at 14:39-40, 44-46.

²⁰ *Id.* at 15:1-3.

- discharged.²¹ This comparison and finding are in error and contrary to controlling law.
21. The ALJ's recommendation that "the Board dismiss the allegations that Pirtle's discharge violated the Act."²² This recommendation is contrary to controlling law.
22. The ALJ's credit of Johnston's testimony over Rhodes' testimony where they directly contradict each other.²³ This finding is contrary to record evidence and controlling law.
23. The ALJ's finding that "Johnson drafted the [intent to strike] letter artfully to make Rhodes' contemplated individual action appear to be concerted action within the protection of Section 7 of the Act."²⁴ This finding is unnecessary and contrary to the record evidence and controlling law.
24. The ALJ's finding that the "evidence is insufficient to establish that [Respondent] knew about [Rhodes' discussions with Todd Johnson] at the time Johnston discharged Rhodes on June 2, 2015."²⁵ This finding is contrary to the record evidence.
25. The ALJ's finding that the case of Rhodes' discharge involves mixed motives and use of the *Wright Line* framework to analyze the lawfulness of Rhodes' discharge.²⁶ This finding is contrary to record evidence and controlling law.

²¹ *Id.* at 16:6-9.

²² *Id.* at 16:40-41.

²³ *Id.* at 17:16-17.

²⁴ *Id.* at 22:7-9.

²⁵ *Id.* at 23:8-10.

²⁶ *Id.* at 25:14-17. While Charging Party asserts a different framework for the 8(a)(3) analysis should have been utilized, in the event the Board agrees with the ALJ's decision to analyze the case under *Wright Line*, Charging Party submits that the factual findings and conclusions made by ALJ Keltner in determining there was no 8(a)(3) violation were still in error.

26. The ALJ's finding that "Respondent would have discharged Rhodes even if he had engaged in no protected conduct."²⁷ This finding is contrary to record evidence.
27. The ALJ's conclusion that Respondent met its rebuttal burden under *Wright Line* and the recommendation that "the Board dismiss the allegations related to Rhodes' discharge."²⁸ This conclusion and recommendation are contrary to the record evidence and controlling law.
28. The ALJ's ultimate Conclusion of Law that "Respondent did not violate the Act in any manner alleged in the complaint."²⁹
29. The ALJ's recommended Order severing Case 10-RC-177308 and remanding for certification of the results of the election.³⁰ This Order is contrary to record evidence and controlling law.

Respectfully submitted,

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²⁷ *Id.* at 25:40-41.

²⁸ *Id.* at 26:6-7.

²⁹ *Id.* at 26:27.

³⁰ *Id.* at 26:34-40.

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2017, I filed a copy of the foregoing electronically via the National Labor Relations Board's website, at www.nlrb.gov. I further certify that a copy of the foregoing was served electronically on all parties at the following addresses:

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